

PLEA BARGAIN A CONCESSION THAT DOJ INDICTED THOMAS DRAKE FOR UNCLASSIFIED INFORMATION

There's something that's missing from the coverage of the Thomas Drake plea bargain. Yes, this is a huge victory for Drake. A huge victory for whistleblowers. Yes, it proves that William Welch is an even bigger hack than the failed Ted Stevens case showed him to be.

But what about the two other charged documents?

Remember, what reportedly sunk DOJ's case was a ruling from Judge Bennett that the government had to provide descriptions of one of the technologies they used to collect telecommunications; the government withdrew—in part or in whole—three of the charged documents in response. But the government originally charged Drake with illegally keeping five documents. The other two were described in the indictment as,

- A classified email entitled “What a Success”
- A two-page classified document deemed “the Regular Meetings” document

If the charges built on these two documents were halfway decent, Drake wouldn't have gotten his misdemeanor plea bargain.

But of course they weren't even halfway decent.

The “What a Success” document was declassified by the government in July 2010, just months after the government indicted Drake.

The “Regular Meetings” document not only was never formally classified—though the government says it should have been and Drake should have known that—but the government tried to withhold from Drake evidence that the document was published on NSANet as an unclassified document.

It is disturbing that the government did not produce the March 22, 2010 memorandum [showing that NSA’s lead investigator had found the document to be posted on NSANet as an unclassified document] to the defense until February 4, 2011, ten months after the Indictment was issued. The information in the memorandum is undisputedly Brady material, and the government should have disclosed it many months ago. None of the documents found in Mr. Drake’s home was marked classified. For some of these documents, the government claims that Mr. Drake had received them originally with classification markings. The significance of the March 2010 memorandum is the government’s concession that the “Regular Meetings” document was published as “unclassified” and had never been deemed “classified” until after it was recovered from Mr. Drake’s home.

Under the Due Process Clause of the Fifth Amendment, the prosecution is required to disclose exculpatory evidence to a defendant in a criminal case. See *Brady v. Maryland*, 373 U.S. 83 (1963). Here, there can be no dispute that the information in the memorandum is exculpatory. In the Indictment, the government charges that the “Regular Meetings” document is “classified.” See Indictment ¶ 17. The fact that the document was marked “unclassified” and was posted on the NSA intranet as “unclassified” directly contradicts material allegations in the Indictment. See *id.*; see also *id.* ¶¶ 2, 3, 3 [sic]

("Classified information had to contain markings identifying the level at which it was classified."); ¶ 8 (alleging Mr. Drake retained and disclosed "classified" documents). In addition, the government clearly seems to be of the opinion that, if a document is classified, this fact supports a successful prosecution under 18 U.S.C. § 793(e) (an opinion with which the defense disagrees). It necessarily follows, therefore, that a memorandum indicating that a document was marked "unclassified" and posted on NSA's intranet as "unclassified" is potentially exculpatory to a defendant who is alleged to have violated § 793(e).

For this reason, the prosecution was under a constitutional obligation to disclose the memorandum to defense counsel, yet chose not to do so. See *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). **What makes the government's actions even more disturbing is the fact that defense counsel had to specifically ask the government for any evidence that the "Regular Meetings" document was posted on NSANet. This request came months after our initial request for all Brady material and the prosecution's representation that it had produced all Brady material. It was only after our specific inquiry about a central document in the case that the government produced the March 22, 2010 memorandum. The government's failure to turn over this exculpatory evidence at the beginning of the case is indefensible.**

And its decision to charge Mr. Drake with retaining a “classified” document clearly marked “unclassified” is, at a minimum, wrong. [my emphasis]

In other words, the government learned a month before they indicted Drake that this document wasn’t actually classified. But they indicted him for it anyway, and simply didn’t provide him evidence showing that fact until 10 months after they indicted him.

So in addition to dropping charges related to the evidence the government withdrew, the government also vastly restructured charges pertaining to these unclassified documents. Mind you, these documents are what the plea information describes (Drake would have collected the other documents pertaining to the IG complaint before 2006).

From in or about February 2006 through approximately March 2007, the defendant intentionally accessed NSANet, obtained official NSA information, and provided said information orally and in writing to another person not permitted or authorized to receive the same. In doing so, the defendant knew that he exceeded his authorized use of NSANet each time he accessed NSANet and obtained said information for that purpose because such access was not for the official use or business of NSA.

But what they had originally charged as “classified” information became “official NSA information” in the ultimate plea agreement.

Mark Benjamin is right to focus on William Welch’s role in the collapse of this case. But we also ought to be asking why the government indicted a person for leaking “classified” information when it knew that it was not classified.